UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

BANNUM PLACE OF SAGINAW, LLC,

Respondent,

and

LOCAL 406, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT),

Charging Party Local 406,

and

ERNIE AHMAD, an Individual

Charging Party Ahmad.

Case No. 07-CA-207685 et al.

Case Nos: 07-CA-207685
07-CA-211090
07-CA-215356

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RESPONDENT BANNUM PLACE OF SAGINAW'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINSTRTIVE LAW JUDGE

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I. STATEMENT OF FACTS

A. Background

Bannum Place of Saginaw, LLC ("Bannum") is a facility that provides residential reentry services for Federal inmates under a contract with the Federal Bureau of Prisons ("BOP"). [JD 7:9-12] This type of facility is commonly known as a "half-way house" for prisoners. The contract between the BOP and Bannum, contains a Statement of Work [JD 7: 20-22; R. Ex. 3] which contains the BOP's requirements for Bannum, including terms and conditions of employees, such as hiring, firing, wages, staffing ratios, and work rules. The SOW not only covers employees, but also almost every aspect of Bannum's facility, interaction with prisoners, testing of prisoners, rights of prisoners, the lodging for prisoners, and prisoner rights. [R. Ex. 3]

John Rich is the President and General Counsel of Bannum, Inc., the parent company of Bannum. Mr. Rich's offices are located in Florida [JD 7: 14-18] and Mr. Rich makes termination decisions for all Bannum employees at all of its locations throughout the country [Tr. 329, 19-21], including the two individual terminations at issue in this Complaint, Greg Price ("Price") and Ernie Ahmad ("Ahmad").

Ken Schram ("Schram") was Bannum's Director from April 2017 through 2019, when he voluntarily resigned. [JD 7: 17-18] Schram was the only onsite supervisor at Bannum. [JD 7: 15-18] Price was employed as a Case Manager with Bannum for less than a year. Price previously sought the positon of Bannum's Director, however, that position was instead awarded to Schram.

B. Representation Hearing and Greg Price

After being overlooked, in lieu of Schram, for the Director position, beginning in the summer of 2017, an organizing drive was initiated by Price. [JD 3: 16-17; 7: 31-32]

The International Brotherhood of Teamsters, Local 406 ("Teamsters") organizer Marian Novak testified regarding several union organizing meetings held at the Teamsters Hall located in Zilwaukee, Michigan, about 15 minutes from Bannum's facility. [JD 7: 36-37] However, at hearing Novak and Price provided conflicting testimony as to the dates of the organizing meetings and no notes were ever provided showing that Price attended any of the alleged meetings. Price testified to specific dates he attended several union meetings on the clock, with the knowledge of Schram. However, his testimony and affidavit provided to the Region conflict with his time records and his signed records from the facility. [Tr. 224; 104-105; Tr. 178- 210; Respondent Ex. 4; 5; 9; 10]

Price testified that Schram supported the union effort and even provided Price with Bannum's financial documents and contracts between the BOP and Bannum, even through mid-September 2017. [Tr. 214-217; JD, 11: 24-26] However, the Region's Complaint alleged several unfair labor practices by Schram, including making coercive statements, threats of reprisal, making statements of futility, interrogation of Bannum's employees, and changes in terms and conditions of employment. [GC Ex. 1] While many of these allegations were dismissed by the ALJ, the ALJ found an unfair labor practice regarding Price's allegations concerning his attendance at a union meeting on August 21st and conversation following the union meeting on August 21, 2017. This was despite Price and Schram's time records and a signed facility log documents showing that the allegations could not have occurred on August 21st. [JD 18: 21-45; 19: 1-5]

A representation petition was filed by the Teamsters and Price conceded he placed Schram's personal phone number on the petition, rather than the facility's phone number. On September 27, 2017, a Representation Hearing was held in Detroit, Michigan, which is approximately one and a half hours away from Bannum's Saginaw facility. [JD 3: 16-18]

Price attended the Representation Hearing and testified he was not subpoenaed to attend the hearing on September 27, 2017. [Tr. 225] Although scheduled to work from noon until 9:00 p.m. on September 27, 2017, with a one hour unpaid lunch, Price came went to Bannum in Saginaw at 5:30 a.m., punching in six and one half hours before he was scheduled to begin his shift. After clocking in, Price immediately left and drove with Teamsters Representative Grant Hemminway to the hearing in Detroit. [Tr. 129, ln. 1-25] Price testified he had never punched in early and then left work like this before. [Tr 226, ln. 6-9]

Price acknowledged he never told anyone he would come to work and punch in 6 and a half hours before his shift and then punch out in the middle of his scheduled shift -- he just decided to do it himself. [Tr. 225, ln. 16-21; 205-206] A DHO hearing was also scheduled for September 27, 2017 at Bay County Jail to determine if an inmate at Bannum should be removed from the residential re-entry program at Bannum because the inmate had violated rules, specifically, using another employee's urine for a drug test. Price was scheduled to attend the hearing with Schram and the DHO hearing was to be held on September 27th, prior to 3 p.m. [JD 12: 8-10; Tr. 203; ln. 10-25]

At 11:05 a.m. on September 27th, the brief Representation hearing concluded in Detroit. Afterwards, Price and the Teamsters representative talked a while, went out to lunch, and then drove back to the Union hall. All the while Price remained on the clock. [Tr. 225, ln. 9-25; Tr. 211, ln. 1-5] At 2:38 p.m. and with 9 hours on the clock, Price drove to Bannum, walked in and

at 2:38 p.m, punched out, turned around and left for the day. He never worked a minute, failed to attend the DHO hearing, [Tr. 225, ln. 16-22; Tr. 210] and despite having a full 8 hour regular work day, plus one extra hour on the clock that would usually be an unpaid lunch hour, Price unilaterally ended his day, six and a half hours prior to the end of his scheduled shift.

Price confirmed that he received Bannum's employee handbook, [Jt Ex. 1; Tr. ___] Page 40 of Bannum's employee handbook explains the four most common circumstances for employment termination, including "job abandonment". [Jt. Ex. 1], [Tr. 226, ln. 22-25; 226, ln. 1-11] Price also testified:

> Q. Had you clocked in to work and left and gone back to your house and not performed work, you would have expected to be disciplined, right?
> A. Yeah. [Tr. 213, ln. 7-9]

Price called Schram on September 28th and made a recording of his call to Schram using an application on his phone. [GC Ex. 10; Tr. 199-200] Schram did not know he was being recorded. [GC Ex. 10; Tr. 478] A transcript of the call shows Price called Bannum and Schram informed Price that Bannum had terminated Price's employment for job abandonment on September 27th. [Ex. 10] Price stated his position that Schram knew about the hearing and that Price would not be in on September 27th. Schram responded that was not true and that Price was supposed to go to Bay County for the DHO prisoner hearing with Schram on the 27th. [GC Ex. 10, ln. 2-8]

While Price testified he had an automatic application on his phone for a considerable period of time prior to September 28th and he had a number of texts on his phone, no text or voice messages concerning whether Price would not be going to the DHO hearing, that he would not be at work on September 27th, or that Price would attend the Representation hearing were placed in evidence. [Tr. 205, ln. 2-9].

C. Ernie Ahmad

Ernie Ahmad ("Ahmad") was a short term employee who worked just over 1 year for Bannum. [JD 13: 8] He was employed as a Counselor Aide with Bannum until his termination on November 21, 2017 and worked mostly the midnight shift on the weekends during his employment. [GC Ex. 3; Tr. 249]

Pursuant to the personnel requirements of the BOP, staffing is required at certain thresholds, specifically for night staffing, when most inmates are back in the facility. [See Statement of Work, Respondent 3, Tr. 490-491; 496-498], Mr. Schram testified if a person asked for time off he would try to arrange a switch. [Tr. 489, 490] More importantly, Mr. Schram testified how CA's and relief CAs such as Mr. Ahmad have always had their schedules subject to change – the schedules have always ***literally*** said they are subject to change. [Tr. 503-504; 497, ln. 15-23; 313-314; General Counsel 12]

On November 3, 2017, Ahmad requested vacation time for November 11 and 12, 2017 for a conference for his other job. [Tr. 498, ln. 5-8] Ahmad stated the reason he needed the two days off was to permit him to attend a conference for another job he worked. Although the request was not provided 30 days in advance, Bannum's Director, Kenneth Schram reviewed the request and attempted to accommodate Ahmad's belated vacation request.

Bannum is mandated to have 24/7 staff coverage under its contract with the BOP and the Statement of Work, which is thoroughly vetted by the BOP in audits. [SOW, Page 10]

Mr. Schram was able to secure coverage for Ahmad's request for time off on November 11, 2017. However, despite Mr. Schram's attempt to find another Counselor Aide to fill Ahmad's shift on November 12th, he was unable to do so. [Tr. 496] As a result, Ahmad's request for November 11th was approved but his request for the 12th was denied. Despite being denied

vacation on November 12th, Mr. Ahmad took the day off anyway. Instead of reporting to work, Ahmad called in for his shift on the 12th, stating he was calling in sick.

In light of the fact Ahmad had been denied the vacation for the day he called off, Mr. Schram called Ahmad and requested a doctor's note for his absence on November 12th. Ahmad was upset that Mr. Schram requested the doctor's note and Mr. Schram explained that the reason he was requesting was due to the fact he was just denied the vacation day and he called in for the same day, stating he was sick and that he questioned if it was legitimate, and he would have questioned anyone who would have requested time off and was denied and they called off. [Tr. 568] This was Bannum's policy according to Mr. Rich [Tr. 406, ln. 5-13]

Separately, Ahmad had also belatedly submitted a vacation request on November 3, 2017 for November 18th. Once again, Mr. Schram attempted to find coverage to accommodate Ahmad's last minute request, as he would customarily do. Unfortunately, despite Mr. Schram's attempts, he was unable to secure coverage. Therefore, the request was denied. Mr. Scram had to cover both weekend evening shifts. [Tr. 552, ln. 6-7]

Nonetheless, once again, Ahmad took his vacation day anyway. This time Ahmad called in stating he had a family emergency. As a result, Mr. Schram had to cover Ahmad's shift. This was a clear pattern of abuse of attendance by Ahmad. Instead of providing notice in sufficient time to permit Bannum the ability to accommodate and schedule around Ahmad's request, Ahmad requested time off and then even though he knew there was no coverage, he refused to come to work anyway. [Tr. 552, ln. 6-7] Ahmad was ultimately terminated by Bannum's owner John Rich. (Hearing Transcript at p. 368).

In his May 29, 2020 decision, the ALJ made the following findings Conclusions of Law:

1) That on August 21, 2017, Schram violated Section 8(a)(1) by threatening Price that the facility would be shut down in connection with the employees seeking union representation.

2) That about late October or early November, threatened Ahmad and Nash that the Bannum would shut down the facility if the employees selected the Union as their bargaining representative.

3) That about late October or early November, threatened Ahmad and Nash that he would have to act like a boss and would strictly enforce policies and/or rules if the employees selected the Union as their bargaining representative.

4) Although not alleged in the Complaint and the General Counsel did not amend it's Complaint at any time, that Schram asked Ahmad and Nash how they were going to vote.

5) Termination of Price in violation of Sections 8(a)(3), (4), and (1) of the Act.

6) Change of Ahmad's schedule to the second shift in violation of Sections 8(a)(3) and (1) of the Act;

8) Denial of Ahmad's November 12th and 18th vacation requests Sections 8(a)(3) and (1) of the Act.

9) Requirement of Ahmad to provide a doctor's note when requesting sick leave Sections 8(a)(3) and (1) of the Act.

10) Termination of Ahmad violated Sections 8(a)(3) and (1) of the Act.

II. ARGUMENT

A. The ALJ Improperly Found Bannum Terminated Price in Violation of the Act

Under *Wright Line, a Div. of Wright Line, Inc., 251 N.lR.B. 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)* the General Counsel carries the burden of showing that the Employer's actions were motivated by a desire to impede protected activity. *NLRB v. Transportation Mgt. Corp.,* 462 U.S. 393, 399, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983); *Missouri Portland Cement,* 965 F.2d at 219.

To prove that a discharge violates the Act under *Wright Line,* the General Counsel must initially show that the employee's Section 7 activity was a motivating factor in the employer's decision to discharge the employee. The elements required to support this initial showing are union or other protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. If the General Counsel makes such a showing,

the burden of persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the employee's protected conduct. *Wright Line*, 251 NLRB at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997). In finding that Price was terminated in violation of the Act, the ALJ failed to adequately assess the appropriate legal and factual framework as more specifically discussed below.

B. The General Counsel Failed to Establish a *Prima Facia* Case That Price's Termination Was Unlawful [Exceptions: 3, 7, 8, 9, 10, 11, 12, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 37, 38, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 91, 138]

The ALJ held that Schram violated Section 8(a)(1) before and after Price's termination. [JD: 22, 10-13] Alleged violations of the Act by Schram *after* Price was terminated have nothing to do with Price's termination and animus against Schram. Price was no longer employed. More specifically, the allegation that the ALJ alleges occurring prior to the discharge, was one conversation on August 21, 2017, in which Price allegedly told Schram what the union was looking for at a union meeting earlier that day and Schram allegedly stated his alleged opinion that the union was asking for too much and Schram's opinion that Bannum would shut down the facility rather than give what Price said the union wanted. [JD: 9, ln. 12-16; 18: 45-46; 19, 1-5]

The other two alleged incidents that occurred after Price's termination involved to two other employees, who Price allegedly asked how they would vote, Schram's personal opinion that Bannum would shut down and they would have to pay more in union dues. That is irrelevant to union animus at the time of Price's discharge in both time and scope. Those allegations are simply irrelevant to the decision to terminate Price for his actions on September 27th.

The ALJ fails to properly address Price's testimony that after this alleged discussion on August 21st, Schram provided Price with documents regarding Bannum's contract with the BOP and Bannum's financials (See further discussion below). [JD 11: 15-16; 24-26[1]] Accordingly, after the alleged unlawful acts on August 21st, Price argues that Schram was helpful, not adversarial towards him.

The ALJ alleges that in an off-hand comment a month before Price's termination for job abandonment by Bannum's President, who is located in Florida, that the union was asking for two much and allegedly Schram thought Bannum would just shut the place down rather than pay what the union wanted demonstrates animus. Yet, the ALJ ignores that Schram allegedly continued to take no adverse actions against Price for the month after this alleged conversation.

In fact, it is not contested that Schram did not recommend or make the decision to terminate Price. Rich testified he terminated Price and in fact makes all such decisions. [JD 18; Tr. 330] To impute his alleged actions to Rich is not only misplaced it improperly asserts animus where no facts support the allegation. To the contrary, Rich is the President of Bannum, Inc. [Tr. 323, ln. 21] His testimony on his role in terminations and discipline was not impeached by any witness. Price confirmed that he did not even know who made the termination to discipline him. [Tr. 314]

Rich resides in Florida and none of the witnesses for the Charging Party have ever met Rich prior to the trial. [Tr. 207, ln.12-15] Rich very rarely goes to the Saginaw facility, testifying he may not go at all or at most one time a year and has very little interaction with the Director. [Tr. 376, ln. 25; 377, 1-25; 374, ln. 12-25] There is no testimony or facts in evidence that Schram talked to Rich about Price at all. [See Generally, Tr. 374-376] In fact, the witnesses

[1] The ALJ made not finding against Bannum for the alleged allegation on September 20, 2017, see JD 19: 23-26; 18: 21-44]

did not know Rich oversees multiple re-entry locations across the country and one of his roles is to oversee Federal Bureau of Prison ("BOP") requirements for personnel and staffing components of Bannum's contract with the Bureau of Prisons ("BOP"). [See: Tr. 327-329 generally]

More specifically, Price testified that he was certain that neither Rich, nor anyone in Bannum's corporate structure had any idea of the union activity at Bannum. [Tr. 221-222] Even more, the ALJ alleges animus is demonstrated with respect to Price's termination, because Schram made statements to other employees Nash and Ahmad, that Bannum would shut down the operations and be more like a boss [JD 22: 17-19], but he fails to acknowledge that the facility never closed. To the contrary, as Schram testified, a contract with Bannum was up for renewal by the BOP and was renewed. [Tr.492] The undisputed testimony at hearing was that Bannum's contract with the BOP expired July 31, 2018, after that the BOP had to accept the contract. [Tr. 493, 1-8] This was a complicated process Rich testified to at pages 325 to 328 of the Transcript.

Even more, there are no charges of refusal to bargain with the Union following the election raised in the Complaint. In fact, there are no allegations against Rich or Teel themselves; and specifically, neither of these post-termination statements refer to Price.

The ALJ alleged that three other issues related to Price's termination resulted in his finding of implied animus against Price: 1) the immediate termination of Price after the Representation Hearing; 2) Cursory Investigation; and 3) Desperate Impact. [JD 22 -24]

As noted in *Electrolux Home Products, Inc*., 367 NLRB 307 No. 136 (2019), a, " … finding of pretext, standing alone, does not support a conclusion that a firing was improperly motivated." *Union-Tribune Pub. Co. v. NLRB*, 1 F.3d 486, 491 (7th Cir. 1993),

quoted in *Laro Maintenance Co. v. NLRB*, 56 F.3d 224, 230, 312 U.S. App. D.C. 260 (D.C. Cir. 1995). "It is inaccurate to state, as a general matter, that once a finding is made that an employer's proposed justification is pretextual, the analysis of the employer's motivation is at an end." *Union-Tribune Pub. Co. v. NLRB*, 1 F.3d at 491. Rather, the record as a whole must indicate that the real reason for the discharge was the alleged discriminates union or protected concerted activities. *College of the Holy Cross*, 297 NLRB 315, 316 (1989) ("Both the Board and the court[s] require something more than a bare showing of a false reason, i.e., the support of surrounding circumstances." When an employer has offered a pretextual reason for discharging or disciplining an alleged discriminatee, the real reason might be animus against union or protected concerted activities, but then again it might not. It is possible that the true reason might be a characteristic protected under another statute (such as the employee's race, gender, religion, or disability), or it could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-will employment doctrine.

Under the Board's holding in *Electrolux*, the ALJ improperly imposes a finding of animus without a legitimate basis. There is no question in this case that Price acted wildly inappropriately on September 27th and abandoned his job. He made an incredible decision on his own to clock in six and a half hours before his shift, leave the building, go to a hearing in Detroit, hang out and go to lunch for a few hours with the Union representative, drive back to Bannum, clock out at 2:38 p.m., with 6 an a half hours still left on his shift. He clocked in, was on the clock longer than he would have been with his normal hour of lunch and did nothing. Price's individual decision to clock in 6 and a half hours early, not work, and then come back in the middle of his shift and walk out was outrageous. It is unclear from the ALJ's finding and the record what more investigation needed to be done.

The contemporaneous voice recording of Schram GC Ex. 10 demonstrates was the reason for the termination. He abandoned his job. It is that simple.

As set forth in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5-8 (2019), the appropriate analysis for determining animus is in finding that the General Counsel has demonstrated facts sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. Here, the ALJ, essentially finds that because Price went to a representation hearing and was fired, that was the nexus. That is not enough.

The ALJ argues this is supported by the fact Price was fired fairly quickly, without a long investigation, and when other employees who missed work were not fired. The problem is with the ALJ's analysis is there are no comparators to Price's actions. He engaged in substantial and intentional actions that were so different from any other action on record and so clear and unmistakable, that there are no facts that demonstrate his discharge was because he went to a hearing. There was no need for additional investigation to find Price was scheduled to work at noon and clocked in hours before and that he clocked out with hours left on his shift and he did nothing.

Price went to a hearing in Detroit Michigan that lasted until around 11:03 a.m. It was an hour and a half until his shift started but, Price didn't return for over three and a half hours, and even then he simply clocked and left with six and a half more hours left on his shift. Price admits he had a full day of pay and he did no work while on the clock. None of these facts are disputed. Price abandoned his job in spectacular and unmistakable fashion all while on the clock. He clocked in because he wanted to be paid and did it without authority. He went to lunch after the hearing, taking hours to get back to Bannum, while on the clock, and while he is

usually unpaid. And when he finally got back to work, he clocked out and went home. This abandonment of his job was the reason for his termination. He could have come to work. He had time to come to work, he chose to instead continue on the clock while not working before coming to work hours later only to punch out with almost 7 hours left on his shift.

Assuming the ALJ found that there was some animus, Price made the decision to clock in and wait hours to come back to work on the clock, and then do no work. This was an intentional act on the part of Price that was unrelated to his attendance at the hearing or support of the union. Union activism is not an impenetrable shield against discharge, and the Act "does not give union adherents job tenure." *Chicago Tribune Co. v. NLRB, 962 F.2d 712, 716* (*7th Cir. 1992*) (quoting *NLRB v. Loy Food Stores, Inc.,* 697 F.2d 798, 801 (7th Cir. 1983)). A company is free to discharge its employees "for good, bad, or no reasons, so long as its purpose is not to interfere with union activity." *Loy Food,* 697 F.2d at 801. [*Carry Cos. v. NLRB,* 30 F.3d 922, 926, 1994 U.S. App. LEXIS 19597, *8, (1994)].

Even assuming Schram told Price he could have off September 27th, which the record and Price's testimony actually demonstrate, Schram never approved him to have off September 27, 2017 [Tr. 225-226] Price nonetheless came to work on the 27th in any event. He was never told to come in early, but he chose to do so. Once he chose to clock in, leave and then clock back out in the middle of his shift, with almost 7 hours left -- he abandoned his job. The ALJ implies animus because Bannum did not investigate crystal clear facts and a clear violation of the handbook. Such a finding is without justification, because there was nothing left to investigate. Whatever his motivation or his thoughts, he made an unprecedented decision to clock in as he did, wait hours and then clock back out hours later, which led to his termination.

Price concedes he made the decision to clock in on his own without approval. [Tr. 130, 206-207; 225-226] Price's decision to leave ***because*** he already had his 9 hours of paid time in and he knew Bannum was cracking down on overtime was similarly stunningly unique and ridiculous. [Id.] The ALJ's finding of a cursory investigation is simply without any merit. What more was there to investigate and why is firing an employee who clocks in hours before their scheduled, doesn't work, and then shows up in the middle of the shift and leaves something that should be debated? There was no reason to wait. The facts were clear by the end of the 27th, that Price made a decision to engage in job abandonment and to get paid for not working. Price made a decision to clock in and not work and he was terminated.

The ALJ fails to address the fact that Price even conceded that if you clock in and don't work you will be disciplined. The ALJ alleges Price was disparately treated, but yet there are (thankfully) no other cases remotely like Price's actions in the record. Unlike the other disciplines in evidence, Price did not oversleep, sleep on the job, come in a few minutes late, forget his scheduled day, or call off of work. He came to work with no intention of working in order to get paid a full day, plus an hour and then clocked out. This was an intentional abandonment of his job. Whether he went home to watch tv, attend a baseball game, or attend a representation hearing, Price's actions were so egregious and dissimilar from anything in the record, it is outrageous for the ALJ to lump them together.

Most notably, the ALJ lumps all the disciplines he relies upon together at page 16 through 18 of his decision -- 26 written attendance disciplines for years 2017 and 18. Yet, the ALJ's Decision fails to accurately state that none of the disciplines involved job abandonment, the offense that Price engaged in and was terminated for. The ALJ also glosses over the fact that

Price had less than a year of service and conceded he was already disciplined prior to his termination. [See JD 23: 4-18; JD 16-18]

Price even admits he could have actually been to work on time to attend the DHO hearing by 3:00 p.m. in Bay City, Michigan, but he decided he was going to talk and grab lunch with the Union representative before waiting until he had his nine hours of paid time on the clock, to come back to the facility and leave.

The ALJ alleges that the General Counsel has satisfied the animus prong of *Wright Line*, by alleging, "Clearly the discharge of Price was far out of proportion to the way the Repondent disciplined other employees, some of whom had repeated instances of misconduct." [JD 23: 27-28] What the ALJ improperly failed to find is that Price's actions were out of proportion with any of the disciplines in the record.

The ALJs reliance on *Mondelez-Global, LLC,* 369 NLRB No. 46, slip op. at 1 (2020) is inapposite to his finding. In *Mondelez-Global, LLC,* the individual employees had engaged in protests and over a period of a few months. The Board recognized that there was a temporal proximity and causal link between their wearing of t-shirts, hanging an American flag after reports of outsourcing work to Mexico, and heated disputes during negotiations, prior to the employer discharging the employees for attendance. No such long term animus is found in this case between Bannum and Price.

Likewise, in *Mondelez-Global*, the employer halted its study into excessive overtime as soon as it terminated the employees and did not take action against other employees who engaged in the same conduct, some of which were even more egregious. [Id. at 8]

In this case, there are no more egregious actions than Price's. While discipline was issued for attendance violations, no one has engaged in the type of behavior that Price engaged in on

September 27. He has no one to blame but himself. He was not singled out because he attended the Representation Hearing. Instead, he was fired for abandoning his job and deciding to come to work and be paid when he knew he would not be working and then acted dilatory the rest of the day before clocking out in the middle of his shift, a shift that he was supposed to attend a DHO hearing.

According to Rich, the termination had nothing to do with Price's appearance at the representation meeting and everything to do with the fact he abandoned his job. (Id. at 334). This is corroborated by phone call between Schram and Price on September 28, 2017 (recorded by Price without the knowledge, much less permission of, Schram). (Id. at 478). In the call, Schram confirms that Price was terminated as a result of a decision made by "central office" and not by Mr. Schram himself. (Id.)

There is no evidence in the record that Price going to a hearing in the morning of September 27th had anything to do with his termination for his actions. Rewarding Price's wild belief that he could clock in for 9 hours, clock out in the middle of his shift, do no work and not be terminated, despite a specific work rule in the handbook that says it is one of 4 specific grounds for termination, is not supported by the record and an abuse of discretion by the ALJ. Bannum knew on September 27th that Price was at the Representation hearing. By the end of the day, Bannum was aware that Price had clocked in hours before hand and clocked out in the middle of his shift and not worked at all. He abandoned his job and was terminated for it.

Price states he was permitted to attend the hearing by Schram. Schram denies that and denied it on the contemporaneously recorded call between he and Rich on September 28th. Price testified he clocked in because he had been able to attend union organizing meetings on the clock

in the past by Schram AND incredulously, because he knew Bannum was cracking down on overtime.

> BY MS. NIXON: So why did you leave at 2:30?
> A. Because Bannum was cutting down on hours and overtime,
> and at that time, I already had my hours for the day in.
> JUDGE SANDRON: Nine hours?
> A. Yes, sir.[Tr. 130, ln. 13-17]

So the ALJ, without even discussing the implausibility of this explanation, failed to address that Price testified under oath that the reason he clocked in 6 and a half hours before his shift and clocked out six and a half hours before the end of his shift, on a day he was supposed to go to a DHO hearing with Schram was because he alleges he had been allowed to go to a few hour or two union meetings during the work day in August. Both times, Price testified he was told by Schram that he better get back and to call it his lunch.

> Q. You testified earlier that Mr. Schram told you could go to the union meetings, but you needed to be your butt back to work right afterwards, right?
> A. That's correct. [Tr. 211, ln. 6-9]

The ALJ ignores that Price alleges he never punched out on the previous occasions and testified that he was told by Schram to get back to work right away -- yet he did the opposite on the 27th. In other words, the ALJ left out the fact that at no time prior to September 27th was there any record that Price actually attended a union meeting while clocked in and he was allegedly told if you do, make sure to hurry back. Here, Price did the exact opposite. He clocked in to go to a union meeting, and not only took his time, he never came back to work. Price conversely says that he punched out at 2:38 p.m. on September 27th because he did not want to incur overtime, but going to work would have resulted in him also actually performing a minute of work on a day he had lunch with the union and was to be paid 9 full hours (including an extra hour he would not have been paid had he actually shown for work).

Price testified Schram let him go to meetings on August 7th and August 21st, but was told to get back right afterwards. Price testified he did just that. Yet, the one day Price attended a union meeting when he was not scheduled to work, August 31st, Price did not clock in. [Resp. Ex. 4] The argument that animus played a role ignores the simple logic that Price made his own bed. He chose to engage in a path of clocking in and leaving work that was different than anything Price or any other employee had ever done.

The factual conclusions of the ALJ and the credibility of Price, do not support the finding of animus, or any credibility on the part of Price. Not only is he not credible, any findings of credibility by the ALJ otherwise are not supported by the record. More importantly, the ALJ failed to demonstrate a nexus between the termination and animus.

There is no record or factual development that supports the ALJ's conclusion that the timing, investigation, and alleged disparate treatment support discharge. Moreover, the ALJ did not view the record as a whole or properly analyze the lack of support for any animus on the part of Rich and Bannum. The clear and egregious actions of Price, the lack of any similar action by any other employee to what Price did, the lack of consistency in Price's explanation of why he clocked in and why he clocked out on his own accord in the middle of scheduled shift, and Price's poor decisions that violated the clearly established work rules all demonstrate no animus existed and the finding must be reversed.

As noted in *Electolux, Supra*, even some evidence of disparate treatment does not constitute animus if the *record as a whole* does not warrant an inference of antiunion motivation. See also, *Alexandria NE, LLC*, 342 NLRB 217, 221-222 (2004); *Alldata Corp. v. NlRB*, 245 F.3d 803-809, 345 U.S. App. D.C. 295 (D.C. Cir. 2001).

Price was not truthful in his testimony. The ALJ used the alleged meeting on August 21s as evidence, but the record shows Price could not have spoken to Schram on the 21st about his union meeting and he could not have come back when he says he came back from the union meeting. These were not minor issues. They demonstrate that the ALJ failed to look at the totality of the evidence to find animus. The ALJ found that animus was shown from a meeting that occurred hours after Schram left for the day and Price had left with another employee well before he says he arrived back from the union meeting. Even if this did occur, nothing occurred to Price following the meeting from Schram. Schram did not terminate Price.

Additionally, Price testified he told Schram he was going to the hearing, but there are no records of a text message, or a recorded call, an email of this conversation. [Tr. 205,ln. 2-15] This is despite the fact Price testified he records all his calls and has text messages. Further, Price conceded that he told Schram he was going to the hearing on the 27th and Schram did not approve the absence. The ALJ fails to adequately address this in his Decision.

The ALJ notes that Schram did not stop Price when he arrived and clocked out. The ALJ omits that he saw Price but was working on something as Director of a federal prisoner re-entry program and was on a call. [Tr. 527- 528] That is an important fact to omit. It was already after 2:30 p.m. and the hearing in Bay City had to be completed before 3:00. Price made his decision to go to the hearing and abandon his job and as a result, he was terminated the next day.

Price was scheduled to work the 27th. He was to attend a DHO hearing with Schram for an inmate. He has no records to show he was approved to attend the hearing. The hearing was scheduled hours before Price was to report to work. Price took it upon himself to come in and start being paid, without authorization 6 and a half hours before he was scheduled to work. Price drove with the Union representative to lunch and came back hours after the hearing ended in

Detroit. He could have come to work, but did not. Price clocked in and left. Price could have attended to DHO hearing if he had come back after the hearing. Price could have worked the bulk of his shift had he come back from the hearing and stayed. The following day Schram stated to Price on a secretly recorded call that he did not know that Price was going to the hearing and that Price was supposed to go to the DHO hearing on the 27th. Price testified that he had a good working relationship with Schram and that Schram had provided him information as he requested it just days before.

The ALJ was wrong in not finding that animus was found and that Price's discharge was not lawful. Accordingly, the Board should reverse the ALJ's finding.

C. The Judge Erroneously Found That Bannum Failed To Demonstrate It Would Have Terminated Price If It Were Not For His Union Activities [Exceptions: 3, 7, 8, 9, 10, 11, 12, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 37, 38, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 91,138]

As set forth above, the ALJ' failed to assess the facts and apply them with respect to Price's termination. The same determination would have happened even if the ALJ could substantiate animus and establish a *prima facia* case.

The ALJ found, "Granted, Price could have exercised better judgment and returned to work immediately after the R case hearing concluded." [JD: 23, ln. 41-42] No, he could have come to work and not abandoned his job while improperly on the clock for hours. Price testified he recorded all of his telephone calls, yet there is nothing in the record showing any substantiation to Price's position that he was not going to report to work and or to the DHO hearing.

What the record shows is that Price, and only Price, made the decision to go to the hearing; to clock in without permission six and a half hours early; to go out to lunch instead of

reporting to his shift when he could have; not to ask for a subpoena to attend the hearing from the union; not to put anything in writing, text, or a recorded voice call with Schram to show he was not going to work on September 27th and/or attend the DHO hearing; and to walk in, clock out and leave in the middle of his scheduled shift. But according to the ALJ's decision, none of that matters. Price could have just exercised better judgement, nothing more, nothing less. That type of finding is distorts common sense and the record. The ALJ's holding is profoundly misguided. Although, the Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Richfield Hospitality, Inc.* 369 NLRB No. 111, ft. 2 (2020) *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), his determination on this issue could not demonstrate the lack of preponderance of reasonable determinations in this matter. All of the ALJ's credibility findings with respect to Bannum's witnesses should be overturned as the ALJ made clearly inappropriate findings as to essential findings in this case.

The ALJ credits Price for his statement that he would not accompany Schram to the DHO hearing. [JD 24: 5-11] Such a finding is not supported by any reasonable inference. Schram's contemporaneous secretly recorded call demonstrates that was not the case. [GC Ex. 10] Schram denied he allowed Price to be off of work on September 27th. Moreover, Price's position that he just told his boss, no I have other things to do than to attend that hearing is unreasonable and illogical. Price testified he recorded every phone call, had text messages, yet there are no witnesses to this alleged statement -- other than Price's bald assertion that he told his boss he had something else to do that day, so he wouldn't be going to an important prisoner hearing.

The ALJ review of Schram's testimony and that he could not remember if someone went with him that day. [[JD 24: 11] But the ALJ ignores in his decision that not only is Schram not

employed with Bannum, he was only at the hearing due to a subpoena and was sequestered for 2 and a half days and was asked a question about a DHO hearing that occurred over 2 and a half years before. At the same time, the ALJ discounts and ignores the contemporaneous statement of Schram that occurred on September 28, 2018, as recorded by Price. [GC Ex. 10]

The ALJ also fails to take into account the self-serving and unsupported nature of Price's position. The only individual who gains from Price's statement that he informed Schram he was not going to the DHO hearing is Price. Schram is the Director of a facility, and Price's position is he told him the Director, no, I'm not going to federal inmate's hearing because I have something else to do. That isn't credible. Nor is it credible that Schram allowed Price to miss his scheduled day and skip the DHO hearing, but then immediately told Price the day after that was not true in a call that Schram did not know was being recorded. Such a holding is illogical and not base on record evidence or the totality of the circumstances.

Price concedes he had no authority to clock in before at 5:30 a.m. and did not talk to anyone about doing that. Even Price's allegation that he told Schram he would not come to work, actually demonstrates that Price was NOT excused from coming to work by Schram. The ALJ ignores this important fact. Even assuming Price was truthful in his allegation that he told Schram that he was going to attend the NLRB hearing, Price's own testimony is that Schram never responded to this statement. Schram never changed the schedule, never said ok, and never approved Price not coming in. Schram denies Price asked for permission to be off on September 27th and that he approved his absence. Price himself confirms that NO ONE actually approved him being off on the 27th.

The ALJ's refusal to also consider two important factors is important. First, Schram is not an interested witness. He is not employed by Bannum and unlike Price, he has no stake in the

outcome of this hearing. He testified under oath that he did not excuse Price from the DHO hearing and that Price did not ask and receive permission from him to go to the Representation Hearing on September 27th. Also importantly, Price was an interested party, yet he contradicted the testimony of Union representative Novak on the date of a union meeting and refused to concede despite the time records and log in sheets he signed that he could not have had the discussion with Schram on August 21st that he stated he did in his affidavit is significant and not appropriately evaluated by the ALJ.

Even more concerning is the Judge's fixation on Schram. It is well established that even if the General Counsel has shown a *prima facia* case, the employer has the ability to demonstrate that the same action would have taken place even in the absence of the protected activity. *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996) Here, the ALJ focuses exclusively on determining who he believed more, Price or Schram on whether Price had asked and received permission to be off on September 27th and not attend the hearing. It is obvious that a reasonable interpretation would be that Price did not ask to be off, as he instead chose to actually get paid 9 hours rather than actually perform work. He chose to do this on his own, by his own admission.

Price was playing a game with Schram, the man who had received the job Price wanted, and the man who Price had put his name on the petition in a petty display, that he was doing what he wanted when he wanted. There is no record of a prior discussion or confirmation of this alleged agreement, it is simply Price saying it happened. Nonetheless, the testimony is that Rich made the decision to terminate Price, not Schram.

The facts in the record at hearing are that Schram's position is he did not say Price could have off the 27th, that Price was to go to the hearing, and that Price decided on his own to clock in and not work a full day while on the clock and leave in the middle of his shift. The ALJ does

not even address this essential fact as to the Employer's rebuttal of the allegations. More importantly, Rich makes termination decisions and based on what happened he fired Price. He makes all of the termination decisions for the four Bannum locations throughout the country.

For reasons unknown, the ALJ improperly focuses on Schram, despite his not being a decision maker. As a result, the ALJ erred in not addressing Rich's position that he deemed this to be job abandonment. Whether Price did or did not get approval from Schram, is not as relevant as the fact that Price clocked in 6 and a half hours early and then clocked out in the middle of a shift and did not work. Rich deemed that job abandonment. It is that simple, yet the ALJ refused to listen to and address this straight forward matter.

The ALJ fails to even address the fact that Price could have continued to work the rest of the day even when he belatedly arrived at 2:30 p.m. until his shift ended at 9:00 p.m. The ALJ also fails to address the fact that by the time the Price came to work, it was almost 3:00 p.m. and it was not possible to attend the DHO hearing, which had to be held by 3:00 p.m. And despite the ALJ's finding that "granted, Price could have exercised better judgement and returned to work immediately after the R case hearing concluded," that was Price's sole decision to go to lunch and talk with the Union rather than coming back to work immediately, allowed so much time to elapse and not go to the DHO hearing when he returned.

An important factual issues for the Board to remember is that Price had a right to attend the hearing in the morning of September 27, 2017, just as they have the right to participate in a number of activities outside and inside of work. Price was not scheduled until noon. He did not have the right to punch in like he did, dilatorily act like he did after the hearing and then punch out in the middle of his shift. And as a result he was fired for his own actions.

The facts all demonstrate that Price abandoned his job. He did exactly what the handbook says will result in a termination and the ALJ's decision must be reversed and Price's termination was unrelated to his protected activities.

D. The ALJ Improperly Held A *Prima Facia* Case Was Established To Show Ahmad's Termination Violated the Act [Exceptions: 4, 7, 8, 9, 10, 11, 12, 32, 33, 38, 39, 51, 52, 53, 54, 55, 56, 60, 61, 63, 86, 88, 89, 91, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110 -131, 138]

Ahamd was a short term employee who generally worked a few midnight weekend shifts a week with no supervision. Ahmad asked for three days over two weeks off of work and after only one of the days could be covered, Ahmad called off the rest of the days anyway. Schram was forced to work those midnight weekends and he was upset. [JD 15, ln. 30-32] Understandably so.

The Director of the facility was required to work two weeks in a row on the weekend midnight shift, on top of his regular duties after a part time employee who he had just denied the time off. Schram contacted another Bannum facility Director in North Carolina, who directed Schram to ask for a doctor's note and the note stated that Ahmad had not gone to the doctor for days after he was allegedly sick on November 12th. [Tr. 499] After that, Ahmad did it again, calling off the next weekend on a day he had been denied his time off. Schram, having been forced to work two weekend midnight shifts in a row sent a notice to Bannum's corporate officers asking for Ahmad to be terminated because there was a clear pattern of absenteeism for this short term employee who was calling off after being denied time off when no coverage was available. [GC Ex. 20]

Despite these facts, the ALJ concludes that Ahamd's termination was unlawful, that Ahmad had no discipline in his file at the time of his discharge and that he worked for over a year. [JD 27: 1-6] This holding ignore Ahmad's unmonitored midnight limited work schedule,

and unreasonably elevates Ahmad's record and work seniority well above what the record should properly reflect

The ALJ correctly found that the SOW mandates that Bannum schedule two staff on duty, one male and one female and that Schram posts schedules 2 to 4 weeks in advance. It is also important to understand that Bannum is a 24 hour-a day, 7 day a week facility under very strict contractual guidelines for the monitoring of prisoners. However, the ALJ improperly found that Ahmad's November 21, 2017 termination was in violation of the Section 8(a)(3) and (1) of the Act. [JD 27, 1-6]

As set forth above in the analysis for Price, the *Wright Line* analysis requires more than just a showing of animus to establish a nexus. As noted in *Electolux, Supra,* even some evidence of disparate treatment does not constitute animus if the *record as a whole* does not warrant an inference of antiunion motivation.

On November 3, 2017, Ahmad requested vacation time for November 11 and 12, 2017 for a conference for his other job. [Tr. 498, ln. 5-8] This is only a few days in advance and Schram tried to accommodate the request. It is important because when no one was found to cover his position, it was clearly obvious that Ahmad's absence and calling off for being sick on a day he denied would raise suspicions. [JD 13-16] This was an integral issue for the legitimacy of Ahmad's later call offs when his request were denied on the 11th after being denied.

Ahmad was scheduled to work midnight weekend shifts on November 11th and 12th and November 18th, 2018. [GC Ex. 2] Only two or three people worked that shift and according to Ahmad Schram would only work on the midnight shift, "once in a while". [Tr. 303, 6-13] The ALJ fails to properly address this important fact. This is important because there are only three or four employees who work the midnight shift on the weekend and as admitted by Ahmad, they

do not call off or switch often. More importantly Schram did not regularly cover the midnight shift. [Id.] The ALJ failed to address this fact.

Request for times on vacation forms is regularly filled out by staff dating back to 2015. Ahmad testified he did not interact with Schram very often due to his being part time and working the weekend shift. [Tr. 374, ln. 6-16] Schram also testified that Ahmad brought him a request for time off sheet, which the ALJ confirmed was been in existence since before the union organizing drive. In addition, the ALJ held asking that employees utilize the forms did not constitute a unilateral change. [JD 27, ln. 28-35]

The ALJ does not properly address the belated effect the November 3rd requested time off on November 11th, 12th and 18th 2017 represented. These requests were for consecutive weeks and for midnight weekend shifts that were mandated to be covered by the SOW to watch the inmates and difficult times to cover. Ahmad admitted employees did not take time off or rotate very often, and Schram was rarely on that shift. Ultimately, the ALJ neglects to point out that these were less than desirable shifts and finding a day shift employee to work the night in a half-way house is understandably not an easy task. The ALJ gives little to no credence to the fact that the schedules were already posted, but Schram attempted to accommodate Ahmad's request, asking several employees if they would be able to switch with Ahamad.

Although the ALJ credits Ahmad for his year of service with no discipline, he improperly fails to address that Ahmad only generally worked three midnight shifts, on the weekends, per week over that period.

The ALJ does concede that Schram was upset when he had to fill in for Ahmad on his first absence [JD 15: 30-31]. Again on November 18th, Ahmad called off on a day Schram had already tried to fill but denied Ahmad's request, meaning Schram had to again work for Ahmad

on his scheduled weekend midnight shift for a second time in two weeks. As a result, out of six scheduled shifts, over two weekends, Ahmad asked for three days off, one was approved one and Ahmad called off two of the days anyway, leaving Schram, who's regular work day was 8 a.m. to 5 p.m. to cover and work the midnight shift two weeks in a row on short notice. The ALJ fails to show any actual connection between prior actions and Schram's frustration with having to work two weekend midnight shifts in a row under these circumstances. Schram's recommendation for discipline and discharge of Ahmad is supported by common sense and the totality of the record.

However, in concluding the General Counsel established a *prima facia* case, the ALJ found express animus by Schram where Schram left a message with an employee Nash on November 5th during the union campaign, encouraging her to attend an employer meeting and stating that Ahmad was strongly opinionated and Schram did not want Ahmad to fill the employee's head with propaganda. [JD, 24: 25-30] However, the ALJ does not mention that he separately found that Schram's November 5th message and statements therein were actually not unlawful. [JD 20: 22-33]

The ALJ also improperly assigns animus to Schram because at the beginning of Schram's employment with Bannum, Price asked Ahmad if he was in a union at Ahmad's full time job and Ahmad said he was the union president. [JD 24: 25-30]. However, the ALJ fails to address that this was in April of 2017 (Tr. 245-246), months before Ahmad's November discharge. Moreover, the ALJ concedes that from the time of that conversation through November of 2017, Price testified that Schram was sympathetic to the union and the fact that Ahmad received no discipline from April through November. [JD 27: 1-6]

There has to be some connection between the employee's actions and Ahmad's termination to demonstrate a *prima facia* case. Here the ALJ does nothing but state the fact that

the conversation held in November, without actually stating how this could show animus that effected the discipline.

Bannum is mandated to have 24/7 staff coverage under its contract with the BOP and the SOW which is thoroughly vetted by the BOP through audits. [SOW, Page 10] Mr. Schram was able to secure coverage for Ahmad's request for time off on November 11, 2017. However, despite Mr. Schram's attempt to find another Counselor Aide ("CA") to fill Ahmad's shift on November 12th, he was unable to do so [Tr. 496].

The ALJ reviewed the following four issues to support his allegation that animus was present: 1) the timing of the discipline; 2) the cursory investigation by Rich before termination of Ahmad; 3) Disparate treatment in discharging Ahmad.

However, these findings are not based on the record as a whole or sufficient as a matter of law to find animus.

As outlined in *Tschiggfrie*, slip op. at 8, in order to sustain a prima facia case of discrimination under *Wright Line*, evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8. But the ALJ does not do so here. Instead, the ALJ simply points out his finding that the timing of the discipline was a week or two after changing schedules to allow all CAs to have two days off in a row and after he met with Nash and Ahmad about the election. [JD 24, ln. 41-43] However, the ALJ fails to state any actual connection as to why this timing shows a causal relationship between any protected activity and the adverse action.

The meeting with Nash, Ahmad and Schram which the ALJ held to be unlawful in late October, or early November was unrelated to any discipline. The ALJ's reliance on *East End Bus*

Lines, 360 NLRB No. 180, slip op. 9, is misplaced. There, the Board reviewed similar disciplines that occurred around the time of the discipline at hand. Instead, the appropriate analysis is found in *Electrolux*, *supra*, where the Board made it clear that a determination of animus is based on the record as a whole. (Slip op. at 10). Only where the stated reasons are found to be pretextual or false or not in fact relied upon should discriminatory motive may be inferred, but inference is not compelled. [Id.]

As far as a review of the timing in the context of the record as a whole, the ALJ later held that the change to all CA schedules, including Ahmad's scheduled was actually not a unilateral change. [JD 28, ln. 1-10] Moreover, the discussion with Ahmad in April was seven months prior to his discharge and there was no discipline or other action taken against Ahmad. The isolated conversation the ALJ found to be unlawful with Ahmad and Nash was not disciplinary in nature and does not show a motive to discipline Nash, but rather discussions about the election. In any event these allegations do not show any connection between the request of Schram to request termination of an employee that called off two times in two weeks, after being denied the request initially, leaving Schram to work a midnight shift both weeks. More importantly, Rich made the determination to terminate Ahmad. Schram's letter to Bannum is based on facts. [GC Ex. 20]

The letter recommending discharge from Schram is factual. [GC Ex 20] As this was becoming a pattern, Schram recommended discharging Ahmad. There is no causal connection and the facts are accurate. Rich is in Florida and agreed to terminate Schram. He has very little interaction with Schram. There is no evidence that the decision to terminate Ahmad by Rich could have been motivated by Schram's alleged conversation with Ahmad and Nash. Rich was not there. Further, Rich does not change schedules.

While the ALJ attempts to take a short cut by simply saying that Schram changed Ahmad's schedule and had a meeting in which the ALJ holds that Schram interrogated employees and made coercive statements about the election, he fails to demonstrate how Rich, who was involved in neither action was connected with those events and why his decision was causally connected to Ahmad's union activity. There simply are no facts. The ALJ continues to impute the acts of Schram in meetings and scheduling at the local level to Rich in Florida, despite the record that Rich is the President of a national company that relies on information provided to him. Making a decision to terminate an employee who the Director recommends in writing be terminated for failing to report to work does not establish animus.

Similarly, the ALJ finds Rich's discharge determination to be cursory. However, the record is devoid of any reason why Rich would doubt the facts in GC Ex. 10. They are accurate. There is no dispute. There is no dispute that the employee called off after asking for time off two times in two weeks. Ahmad did not provide sufficient advance notice to change the schedule in advance. The ALJ's conclusion that Rich should have had a deeper investigation into a part time employee's admitted failure to come to work twice is not logical or required. No animus is found. There is a legitimate reason to support the action. There are no facts to support the inference that the decision was cursory.

Like with Price, the ALJ finds the discipline was disparate. But again, like Price, there are no records of similar behavior. No one else called off two times, in two weeks, after being denied leave as Ahmad did and required the Director to work midnight weekend shifts. The ALJ's position that other employees have called off, does not adequately address the requirement that the ALJ review the totality of circumstances requirement to determine if animus is present. [See: *Wright Line* and *Electrolux, Supra]*. Schram does not work weekends. Very few employees

work the weekend night shift at this half-way house, attending to federal inmates. Schram was forced to work those undesirable shifts to ensure compliance with the SOW twice in two weeks. The ALJ refused to acknowledge there are no other similar disciplines.

E. The ALJ Improperly Found Respondent did not Rebut the Presumption that Changing Ahmad's Schedule was Motivated by his Union Activities [Exceptions: 4, 7, 8, 9, 10, 11, 12, , 32, 33, 38, 39, 51, 52, 53, 54, 55, 56, 60, 61, 63, 86, 88, 89, 91, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 110 -131, 138]

Under *Wright-Line*, once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

Here the ALJ ignores the facts as set forth above. Ahmad's schedule was changed because Schram wanted to provide employees with two consecutive days off. [Tr. _] This applied to all employees, not just Ahmad and is a legitimate non-discriminatory reason. This is a stressful location with federal inmates in a 24 hour a day, 7 day a week facility. The ALJ's positon that Schram gave a vague explanation for the decision is not true. He explained exactly why he made the change and it was a legitimate and non-discriminatory reason.

The denial of Ahmad's vacation request was because Ahmad waited until after the schedule was posted and no one could cover his shift. This was not because of union activities. Schram tried to find someone to cover the midnight shifts that Ahmad requested at the last minute. The finding that Schram was required to simply work the midnight shift if Ahmad randoml said he wasn't going to be able to make it in is impractical, but moreover, it is in consistent with Ahmad's own testimony that he rarely see Schram. As a result, the ALJ ignored this important fact that Schram does not have to automatically cover for every employee any

time they decide they need time off. A finding that Schram must do so would create an absurd result allowing all employees in a facility with a federal contract, to require one person to work all shifts at all times. If two employees said they wanted the time off and no one could cover, then Schram would therefore be required to somehow cover both shifts. Not only is that impossible it is not based on any record evidence. The ALJ made an unsupported finding with respect to this matter.

The ALJ found that requiring Ahmad to submit a doctor's note after calling in sick was retaliatory. [JD 26: 5-17] However, despite the ALJ summarily rejecting out of hand Bannum's policy is to require employees to have a doctor's note, [Id] the record demonstrates that *this is* the policy of Bannum. Rich testified he expected employees to go to the doctor if they were sick and absent. The ALJ improperly rejected this positon "out of hand" [JD 26, 43-45], yet Rich's testimony was corroborated by Schram's testimony that he contacted a different Bannum and the Director there who trained him, said it was appropriate to ask for a doctor's note. It is important to remember that Schram is no longer employed by Bannum, this event took place over two years prior, and Schram was sequestered during Rich's testimony, but he testified that he contacted his mentor, who was the Director in Bannum's Wilmington facility at the time Kim Brown, who had previously trained Schram when he started. [Tr. 499]

Bannum rebutted the position that Schram's action were pretextual by showing that the action was in good faith under the circumstances and was consistent with attempting to respond to the actions of an employee based on other Bannum Director's advice.

The ALJ's finding on the discharge does not address that Rich testified he made the decision and it was not based on any alleged union activity of Ahmad. More importantly is still unclear what Ahmad did that was protected activity or why Rich would chose to retaliate against

him. The ALJ's finding of animus and that there was no rebuttal of a prima facia case, are both based on a position that Ahmad engaged in protected activity or because of his union support. But there is no allegation that Rich or anyone at Corporate were ever aware of these alleged actions. The ALJ fails to address this critical nexus argument.

Rich alleges that he spoke with Teel and Allen.

Q. Who made the decision to terminate Mr. Ahmad, if you know?
A. I did.
Q You did. Why did you terminate his employment?
A. As is usually the case, I had a case with Katrina Teal and Sandy Allen. They relayed to me the situation wherein an employee, Mr. Ahmad, had asked for time off, sometimes call it vacation time, but basically asked for time off to work his regular shift. When the director could not find someone to work that shift, the director said, I'm sorry, I need you here. I need you to work, and low and behold, twice he -- on 2 of those days as I recall, he called in sick. So 2 of the days that he had been denied time off, given that we had no one else to work those time, he called in sick. So that, to me, was grounds for termination.
Q. Okay. And is that because of absenteeism or is there something special about this case?
A. Well, to me that was a integrity issue.
Q. Why?
R. A. You know, you asked for the time off, you wanted those days off, and then when you didn't get them, you just called in sick and said you just couldn't make it. And you know the problem with that is that it puts the labor for the facility and the coverage that we have, that's we're required under the contract, in jeopardy. [Tr. 368-369]

Neither Teel or Allen were alleged to engaged in any unfair labor practice activities with respect to Ahmad. More importantly, M there is nothing in the record to show that Rich was engaged in trying to root out union supporters. The reason for the termination is simple, Schram recommended it to corporate. The officers of the company raised the issues to the President and he fired a person in Saginaw who called off repeatedly after asking for time off. This is not just a

rebuttal, it is a legitimate rebuttal unrelated to any allegation by individual who do not work in Saginaw and were not alleged to have engaged in any of the unlawful conduct.

The ALJ's finding at pages 25 to 27 of his decision are not properly based on fact or law. The record also shows that the schedules themselves actually say they are subject to change and Schram explained that he changed schedules to allow all CAs to have two consecutive days off due to the mental stress of working in the Bannum environment. [Tr.] The ALJ also found that the timing of a meeting in late October and early November with Ahmad and Nash in which the ALJ found that Schram asked Nash and Ahmad how they intended to vote, that the facility may close down if they vote if the union was voted in, wages would probably drop if they had to pay union dues, and he would have to be stricter as a boss. [JD 19, 40-45; 20: 1-16]

In light of the fact Ahmad had been denied the vacation for the day he called off, Mr. Schram called Ahmad and requested a doctor's note for his absence. Ahmad was upset that Mr. Schram requested the doctor's note and Mr. Schram explained that the reason he was requesting was due to the fact he was just denied the vacation day and he called in for the same day, stating he was sick and that he questioned if it was legitimate, and he would have questioned anyone who would have requested time off and was denied and they called off. [Tr. 568] This was Bannum's policy according to Mr. Rich [Tr. 406, ln. 5-13]

Separately, Ahmad had also belatedly submitted a vacation request on November 3, 2017 for November 18th. Once again, Mr. Schram attempted to find coverage to accommodate Ahmad's last minute request, as he would customarily do. Unfortunately, despite Mr. Schram's attempts, he was unable to secure coverage. Therefore, the request was denied. Mr. Scram had to cover both shifts. [Tr. 552, ln. 6-7]

Nonetheless, once again, Ahmad took his vacation day anyway. This time Ahmad called in stating he had a family emergency. As a result, Mr. Schram had to cover Ahmad's shift. This was a clear pattern of abuse of attendance by Ahmad. Instead of providing notice in sufficient time to permit Bannum the ability to accommodate and schedule around Ahmad's request, Ahmad requested time off and then even though he knew there was no coverage, he refused to come to work anyway. [Tr. 552, ln. 6-7]

Having had to cover two weekend midnight absences for Ahmad in two weeks, on two days that Ahmad had already asked for time off and was told there was no coverage, Schram sent a notice to Bannum's corporate office asking that Ahmad be terminated as a pattern had been established. Ahmad was ultimately terminated by Bannum's owner John Rich. (GC Ex.20; Tr p. 368). For the reasons set forth in this Section E and in the other Section of this Brief, the ALJ's findings set forth in Paragraph 4 (a) through (d) are without justification and must be overturned. [JD 28: 24-39]

F. The ALJ's Findings With Respect to Ahmad are Unfounded [Exceptions: 4, 7, 8, 9, 10, 11, 12, 32, 33, 38, 39, 51, 52, 53, 54, 55, 56, 60, 61, 63, 65, 33, 60, 63, 61, 62, 86, 88, 89, 91, 95, 96, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110 -131, 138]

As the ALJ held, in mid-November, Schram posted a new schedule that would allow all CAs to have at least 2 consecutive days off (GC Ex. 14). However, without any explanation, the ALJ then without any factual or logical reason states, "Schram offered no cogent explanation for the need or timing of this change, vaguely alluding to employee's mental health." [JD 13: 31-36]

The ALJ's finding ignores or overlooks and ignores that all of the schedules posted by Schram state that the schedule is subject to change. [GC Ex. 14] The ALJ also ignores and fails

to properly credit Schram's detailed explanation as to the thinking and reason for an overall schedule change that applied to all CAs, including Mr. Ahmad. [Tr. 503-504]

Schram did not give a general response as to why the schedule was changes. Schram testified that he was in charge of scheduling and he believed it was in the best interest of all employees to have two consecutive days off in light of the difficult type of work the employees handled with the federal prisoners. So in order to try to better schedule employees to have a proper break for mental health, rather than a random day off and then work a few days and another random date, Schram changed the schedules to allow all CAs to have a day off. [Tr. 504] Schram testified that not only did he attempt to change this for CAs, but he also wanted to do this for management as well. [Id. At ln, 1-6]

The ALJ's finding of a violation of the Act for scheduling him to work on the second shift is inconsistent with the ALJ's finding that such a change was not a unilateral change. [JD. 28: 1-10 Likewise, each schedule states they are subject to change. [GC Ex. 2]

Ernie Ahamd was a part-time employee who worked just over a year for Bannum. He was a party and not sequestered and listened to Mr. Price and Ms. Nash's testimony before testifying. Mr. Ahmad is a disgruntled former employee seeking back pay and reinstatement. He testified he is not bound by his own word, testifying adamantly under oath that when he applied to work at Bannum, he made it clear that he had another job and *could only work part-time*. But when confronted with his application (Respondent Exhibit 8), he was forced to concede that he actually stated in his application that he was available to work full-time, part-time or shift work. [Tr. 318, ln. 5-14]. Later, when pressed, Mr. Ahmad was shown that his signature on his application

> Q. BY MR. HAMMOND: Look at page 5 of that document. The applicant's statement where you have your signature. Do you

see that?
A. Yeah, I see that.
Q. It says, I certify that the answers given herein are true and complete to the best of my knowledge. So are you testifying that this isn't true and complete?
A. **That's what I was told to do on my application, when I got the interview and I did what I was instructed to do.**
Q. So when you're told to do something, you don't necessarily tell the truth? [Tr. 320, ln. 16- 22, emphasis added]

Mr. Ahmad not only admitted that he either falsified his application to better his changes at getting a job, or he falsified his testimony at hearing to help him strengthen his claim to a monetary award in this matter. He was also combative at hearing, demonstrating the type of repetitive defiance that led to his back to back refusal to work after being denied his request for time off that led to his discharge.

The ALJ's positon that Ahmad was credible is simply not consistent with his actions and testimony. He was a combative witness who refused to ask why he asked for November 18th off at hearing. He acknowledged he was untruthful on his application and the ALJ had absolutely no problem with that. This is a serious case and a serious allegation. To find Ahmad credible these facts must be taken seriously into account. Schram's testimony was consistent through out. Yet, the ALJ ignores that he is a neutral witness with nothing to gain in the hearing. The allegation that he changed his position at any time is mincing words. Likewise, Rich is the President of a National company and answered questions about his terminations and decision in a measured and truthful manner. Yet, the ALJ used that against him.

The ALJ found that Schram met with both Ahmad and Nash and interrogated both employees about their union activities or sympathies and threatened employees with the closure of the facility, wage reduction, and stricter enforcement of rules if the employees voted in the Union. In two years since Ahmad's termination the Region has investigated the claims and

issued an Amended Complaint with 13 individual Charges against Schram, most of which were dismissed. Yet, at hearing for the first time, the allegation was raised that Schram asked if he and Nash knew. Here the General Counsel never amended its compliant at hearing and Bannum was not advised the ALJ would be amending the Complaint. [JD 20, 8-16]

Schram is no longer an employee of Bannum and he was under sequestration during the hearing. Bannum had no legitimate right to respond or prepare to the allegation. Schram denied that he a fundamental violation of due process. The ALJ cites *Enloe Enterprises Center*, 346 NLRB 854, 854, fn. 3 (2006) for the proposition that a Complaint can be amended but fails to address that his unilateral decision to find an unfair labor practice without the Complaint being amended is not a result of a full and fair hearing where the critical witness is sequestered and the allegation was never raised. Moreover, the fact that the General Counsel never alleged the allegation that Shram asked Ahmad and Nash how they were going to vote does not substantiate it happened. To the contrary, it demonstrates that if it did not come up in 2 years, it did not happen. There was no timely allegation or contemporaneous allegation. Accordingly the ALJ's finding must be reversed.

More importantly, Ahmad and Nash conflict on this and Nash is completely silent on this allegation. [Tr. 255-260] The ALJ fails to address this critical fact. Nowhere in Ahamad's testimony does he say Schram asked him how he voted. [Id.] The ALJ fails to adequately acknowledge that Nash was another short term, former disgruntled employee. Nash testified she quit working for Bannum in January of 2018 [Tr. 49, ln. 22] after she was issued a discipline on November 6th for being 38 minutes late. [Tr. 428, ln. 22-25; GC Ex. 3]

Her testimony was that Mr. Schram met with her and Ahmad and asked how they were going to vote in the election. [Tr. 53-54]. Not only does the ALJ fail to address the key

credibility problem of this belated allegation, he finds against Bannum, despite there being absolutely no substantiation and a clear conflict. Nash comes out of the woodwork to level an accusation no one has heard of in 2 years and which Ahmad has no recollection.

It is important to remember Ahmad was not sequestered. The allegation must be dismissed because there is no credibility.

So the remaining allegations against Bannum and specifically leveled at Schram for threatening employees with closure of the facility, wage reduction if they paid dues, and stricter enforcement are simply not believable. Ahmad admitted to being untruthful and combative. Nash, as indicated above is inconsistent with Ahmad and disgruntled. Moreover, the fact is the contract with the BOP was going to expire. [Tr. 528-530] Schram testified the coming contract deadline was no secret, the contract ran through July 31, 2018, and he had a conversation with his staff until the date that eh contract expired But he clarified that he never said that the facility is going to close if the union gets in. There is no allegation that Rich ever said he was going to close the building down. Schram never testified he heard Rich say this and neither did Mathew Call of the BOP.

Shram's statement is consistent with the fact there was a contract and it was up for renewal. Ahmad and Nash's position is that the facility would be closed if the union got in.

Where Rich answered truthfully and openly about his role in disciplines two years before and the operations of Bannum and where are no documents that show he was impeached by anyone at hearing, Ahmad who admitted to lying on his application and was combative and refused to answer questions. Likewise, the ALJ credited Price, who was repeatedly caught making inaccurate statements under oath The ALJ's credibility findings with respect to Schram and Price are not based on the record. Quite the opposite, the ALJ did not want to hear any

information that impeached their credibility and made credibility determinations that were not based on the record. Accordingly, the Board should review the testimony of all witnesses to make a credibility determination.

G. August 21, 2017 Findings and Credibility Determinations With Respect to the Price[Exceptions: 3, 5, 6, 7, 8, 9, 10, 11, 12, 21, 22, 23, 24, 25, 26, 27, 28, 29, 35, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 57, 58, 59, 61, 62, 65, 66, 67, 79, 80, 81, 82, 83, 84, 85, 94, 138]

The ALJ found that Schram threatened Price that the facility would be shut down in connection with the employees seeing union representation. But the record demonstrates this finding could not have happened. While the Board generally does not touch an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Richfield Hospitality, Inc., Supra, they must do so here.

Price's testimony is not credible. In addition to the facts set forth above, his testimony was consistently proven to be unreliable and contrary to record and testimonial evidence. Novak, testified there was a union meeting that Price attended on November 1, 2017 [Tr. __] However, Price said that was not true, first testifying it was in fact on August 2nd and then settling on August 7th. [Tr. 98, ln. 24-25, 99, ln. 1-6]. Price also testified:

A. There was another meeting for August 7th that was scheduled. Again, that was a day, a PRT meeting, a probation officer. I came in at noon. I reminded Director Schram that we needed to attend this meeting. Director Schram said that we could go and return after the meeting. Me and Melanie punched out at 1:45. We turned in union cards from employee to show their interest. We talked a little more to see how thigs were going. We returned to Bannum at 4 o'clock. [Tr. 97, ln. 13-20] (Emphasis Added)

Although testifying he "punched out" at 1:45 p.m. on August 7th, Price and Melanie Turner's time cards show that they actually did not "punch out" at 1:45. Price, later contradicted

his testimony, stating he actually did not punch out, he went to the August 7th meeting on the clock. [Tr. 98, ln. 2]

Price testified and provided affidavit testimony that the next union meeting was August 21st. [Tr. 100] Price testified he attended the August 21, 2027 union meeting during his scheduled work day, with the knowledge of Schram at the Teamsters hall from 2:00 p.m. until his return to Bannum at 4:00 p.m. Price also testified that when he returned at 4:00 p.m. he met with Schram alone and Schram asked what was discussed and Schram shook his head and said the employees asking for too much and Rich would not approve any of it, and Rich would just shut the place down, and he would do the same. [JD 18: 21-25]

However, the Schram's time records for August 21 show he clocked out for the day at 2:23 p.m. The facility log book entry, written by Schram verifies that Schram left for the day at that time. [Ex. ___; ___] Additionally, Price's time records show he could not have returned from a union meeting at 4:00 p.m. on August 21st, as he actually left with another employee Melanie Turner at 3:48 p.m. and did not return to Bannum until 7:43 p.m.

Price conceded his signature was next to a log entry for August 21 showing he left at 3:48 p.m. on August 21st. Notably, the Complaint alleges a number of allegations specific to an alleged conversation between Price and Schram on August 21, 2017, including Paragraphs 10(a) and (b), and the ALJ found an unfair practice Price testified as followed on direct examination about August 21, 2017:

> Q. Okay. Did [Schram] say anything in response?
> A. He said go, and when it's done, come right back.
> Q. Okay. What time did you return after the meeting?
> A. We returned at 4 o'clock.
> Q. Okay, when you returned, did you have any discussions with Mr. Schram about the meeting?
> A. Yes.
> …

A. Mr. Schram asked me what was the conversation about. I told him wages, better lighting, cameras around the facility, cost of living, shift premiums, and we requested that we get retirement.
Q. Did Mr. Schram respond?
A. He did respond.
Q. What did he say?
A. He shook his head and aid we were asking way too much, and Mr. Rich wasn't going to approve none of it. And furthermore, he responded that Mr. Rich would just shut the place down and Scrham commented as he would do if he was in that position. [Tr. 105, ln. 3-25]

Price also reviewed his affidavit provided to the Board and testified he submitted an affidavit to the Region on this alleged discussion with Schram on August 21, 2017:

Q. Okay. Now on page 9, it indicates you returned at 4 o'clock on your next meeting…August 21st. … August 21st, you returned back from the Teamsters meting at 4 o'clock. It indicates that you met with Mr. Schram in his office at lines 193 to 197. Is that accurate?
A. That is. That's accurate. [Tr. 224, 12-25]

Price was consistently inaccurate and that cannot be glossed over as just a haze of time. He was very specific with his dates and times. He provided affidavits to the Board and sworn testimony of the August 21st events, and even took the chance to correct the union representative on August 7th. But even in that case, he was mistaken. The fact that the alleged conversation did not occur on August 21s is not debatable. Price had to acknowledge he signed the log book and the times on the log book match his time records, Schram's timer records, and Turner's timer records.

But what the ALJ and General Counsel's actions at hearing, demonstrate the ALJ's finding that the events did happen on August 21s , in spite of the record, is troubling. In fact the ALJ's refusal to properly assess credibility and the threat to use an inference against Bannum was inappropriate and foreboding. See Pages 191 through 205, in which the General Counsel interrupted Price's cross examination showing the events as he described on August 21st could not happen based on documentary evidence, and General Counsel's statement that, "[Price] did

not testify that he talked to Mr. Schram on 8/21 –" [Tr. 191, 19-20] – when he unequivocally said that in affidavit to the Region and at hearing and engaged in prolonged voir dire on simple documents that showed Price could not have had the conversation with Schram.

In these same pages of transcript the Judge threatened to take an adverse inference if Turner was not called to testify that the log and time book times confirmed undisputed facts as to Price and Turner's whereabouts on August 21st, interrupted cross examination of Price when he was asked to confirm portions of his voice message with Schram on September 28th that confirmed Schram did not terminate Price, and interrupted cross examination of Price regarding that Price was not actually approved to leave for the hearing on September 27th. [Id.]

The ALJ did not want to allow the record to fully develop that Price's testimony was not supported by facts and that there was no support for the allegation that Price's termination was not in violation of the Act.

In addition, the ALJ cut off cross examination of Price asking about whether Schram terminated him, and explained that it did not matter what General Counsel said about who terminated Price, despite the fact that was alleged in the Complaint and the Decision stated implies Schram's actions were relevant to the determination of whether Price was terminated in violation of the Act.[Id.]

Bannum reincorporates its position set forth in Section F, regarding Rich's credibility. His testimony as to the decision to terminate Price was sullied repeatedly by the ALJ without any record evidence. The ALJ dismissed Rich's credibility, without any reason or contradictory evidence in support. Rich was consistent in his testimony that he made the decision and it was not related to any union activity, but rather the actions of Price.

Accordingly, all aspects of the decision related to the meeting between Schram and Price must be dismissed, including the stand alone allegation at JD 18, 45-46, 19: 1-5 and the finding that Price's discharge was unlawful, as it is supported in part by the allegation that the discussion occurred on August 21.

H. The ALJ's Finding of the Adverse Witness Rule Was Improper [Exceptions: 13, 14, 15, 16, 30, 83, 90, 138]

Rich made both termination decisions, both Price and Ahmad. He testified credibly as evidenced by the whole records that he made the decision. The ALJ continually made defense of this case more difficult. He interrupted cross examination of Price and Ahmad as described above on seminal issues, found Rich not credible despite a reading of his transcript testimony that shows he was consistent and accurate throughout, and unilaterally found a ulp that was never alleged, despite no corroboration. The ALJ found Rich not credible on asking for a doctor's note for an employee who is sick and found him to be evasive, despite him answering all questions asked. As described above, unlike Price, who repeatedly provided statements under oath and in affidavits that were false, and Ahmad who was combative and admitted to signing his name to get his job, knowing it was untrue, Rich was truthful.

Nonetheless, the ALJ states at footnote 7 of his Decision that Teel was in a BOP audit in South Carolina, and he provided Respondent an opportunity to accommodate her schedule. That is not true. Teel was and continued to be in the audit throughout the three days of hearing. There was no accommodation other than to allow her to come to the hearing when she was not available as documented in the Motion to Postpone trial that was denied. [Ex. 2(v)] It is unclear why delaying a matter that was over two years over until after the audit was complete was not

granted. The ALJ's findings and stance on this distorts the fact that only after it was clear that Teel could not be present because she continued to be in audit during the hearing and the motion to postpone the hearing was denied, did Respondent rest.

The ALJ irrationally threatened to take an adverse inference earlier in the hearing if Bannum did not call Melanie Turner just because she was listed on Respondent Ex. 5 and her time records confirmed she and Price were not I the building at 4:00 as Price testified and left for hours while Schram left for the day at 2:23 p.m. leaving Price's testimony unconfirmed. [Tr. 194-196] However, the ALJ did not make any adverse inference against the General Counsel or Ahmad for not calling Turner to support their allegations that they attended union meetings and conversations with Schram [Tr. 26, 30, 103, 104, 130-131]

The ALJ's adverse inference against a person who did not make the termination decision for either employee is not supported by the facts or case law. First, Ms. Teel was not available and Neither she nor Allen made no decisions. The ALJ's Decision has conflated issues, made unfounded and unilaterally harsh decisions against Bannum, and ignored the record. The President of the Company flew in from Florida and testified for two days, despite having a medical emergency.

Instead of listening to the decision maker and ignoring record evidence, the ALJ abused his his discretion against Bannum that did not make the termination decision[2]. The ALJ's findings are not grounded in the facts of the case or sound reasoning. Bannum asks the Board to review the totality of the exhibits and testimony, and disregard the ALJ's abuse of discretion.

[2] Applying an adverse inference is not mandatory, but a discretionary tool, but is to be used for factual questions. [See *Natural Life, Inc.*, 366 NLRB No. 53, (2018), Slip op. 23, where adverse inferences were made where the party failed to make attempts to procure a witness. In this case, Bannum attempted to secure the witness prior to hearing, as evidenced by the motion to postpone, but she remained in an audit with the BOP.

I. Bannum Is a Joint Employer of The Bureau of Prisons [Exceptions1, 2, 5, 6, 7, 138]

Prior to the hearing a motion to dismiss was filed dismiss the case because the NLRB lacks jurisdiction over Bannum because Bannum is a joint employer of the BOP. General Counsel 1, Index and Descriptoin of Formal documents, including Bannum's motion to dismiss.) Bannum renews its motion and asks the Board to dismiss this case.

The ALJ's Decision at page 2, lines 14-23 clarify that the ALJ knew that Bannum had filed a Motion to Dismiss the case. However, later, found in his factual section, "The Respondent admitted Board jurisdiction as alleged in the compliant, and I so find." [JD 7: 11-12] This is inaccurate and ingnores the ALJ's own conclusions and the record evidence. Not only did Bannum file a Motion to Dismiss, its Answer to Paragraph 2 states that "…it is a co-employer with the Federal Bureau of Prisons operating under contract with Federal Bureau of Prisons." Likewise, Bannum's Answer to Paragraph 4 of the Complaint states, 'Respondent denies that it is an "Employer" as defined by the National Labor Relations Board, as it is a co-employer of the Federal Bureau for which the National Labor Relations Board lacks jurisdiction. And Affirmative Defense 1 to Bannum's Answer to the Complaint is, "The National Labor Rleations Board Lacks jurisdiction over Respondent." [GC Ex. 1(s)]

The ALJ's decision also states that while he denied the Motion to Dismiss, he provided Bannum an opportunity to provide additional evidence at hearing. [JD. 2: 14-23] However, at hearing, the ALJ denied, out of hand, Bannum's the idea that questions could be asked of BOP employee, Mathew Call who handles DOL audits. [Tr. 588, ln. 1-17].

Bannum respectfully requests the Board review the Motion and grant it, or alternatively review the decision and take into consideration the statement that Mr. Call made at hearing with

respect to the BOP's review of Bannum's action in addition to the facts set forth in Bannum's Motion to dismiss:

> A. So I would perform on-site monitoring and remote monitoring of that facility. We typically would do three -- what we call interim monitoring, where we go and we look at the complete and total operation over the course of the three visits. Then we would also do one full monitoring annually, that was, again, overview of their entire operation. Make sure that they're adhering to the contract that we have with them, and oversee the building, every aspect of their operation. To the extent possible. [Tr. 585, ln 1-9]

Mr. Call also confirmed the BOP monitors, staff hours, ensuring males and females are working every shift that is required by the BOP at the facility and that, " I will administer, you know, all the policeis from the Bureau of Prisons, and just look at all aspects of the operations, from food service all the way down to accountability, when I'm on-site doing montorings of the nature of an interim monitoring." He even reviews personnel files. [Tr. 603, ln. 7-23]

III. CONCLUSION

In light of the above and the record as a whole, Bannum respectfully requests that the Board reverse the ALJ's Decision in its entirety and dismiss all charges and relieve it from all Orders and Decisions issued by the ALJ in his May 29, 2019 Decision. Alternatively, Bannum respectfully requests the Board provide such other relief to Bannum as the Board deems necessary and appropriate.

Respectfully submitted,
FOSTER SWIFT COLLINS & SMITH PC

By: /s/ Clifford L. Hammond

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DATED: July 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on July 6, 2020, I electronically filed the foregoing Respondent Bannum Place of Saginaw's Exceptions and Brief in Support to using the NLRB's Electronic filing system, and provided email service on Respondents IBT Local 406 and Ernie Ahmad as follows:

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By: /s/ *Clifford L. Hammond*

DATED: July 6, 2020

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